CORRECTED VERSION

LAW REFORM COMMITTEE

Inquiry into powers of attorney

Melbourne — 1 October 2009

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Witness

Mr J. Gardner.

The CHAIR — I will open the hearing and welcome Julian Gardner. Thank you very much for coming, and thank you very much for your submission. There are just a few preliminaries which I am sure you are very familiar with. All evidence taken at this hearing is protected by parliamentary privilege as provided in the Constitution Act 1975 and further subject to the provisions of the Parliamentary Committees Act 2003, the Defamation Act 2005 and, where applicable, the provisions of reciprocal legislation in other states and territories. Any comments you make outside the hearing will not be afforded such privilege. We are recording the proceedings, and you will be sent a copy of the transcript. You will be able to make any adjustments to it. We have 45 minutes, so I hand over to you to make any comments and to set us up. We then have a number of questions we would like to ask you.

Mr GARDNER — Thank you, Chair. I will not go over the written submission in detail; it would only waste your time. I guess the nub of what I would argue is that any reforms to enduring powers of attorney should have at least three goals: firstly, to increase the extent to which enduring powers are used and assigned; secondly, to increase the extent to which they are used effectively, and thirdly, to minimise or reduce the abuse of those powers.

The reasons why I put forward those goals are threefold. Not in order of importance, but the first is to reduce the costs to the community and to the individual. I do not think I need to labour the demographic and morbidity data which clearly indicates that we are going to have a far higher number and proportion of our population who almost inevitably are going to lack capacity because of dementia. I think very clearly we need to start taking steps now to deal with that. Somebody who at present has need of a guardian or an administrator because they have not appointed somebody themselves, and there is a need to make decisions, imposes an impost on the state. There is the cost of running VCAT, the cost of running the Office of the Public Advocate, and the subsidised cost of administrators, whether it is State Trustees or whatever. There are significant costs, and I think we cannot really afford those in the future. Therefore anything we can do to reduce that is important.

I also make the point here that we should not just assume that enduring powers are important for people who lack capacity. In my submission I provided an extract of a study about the fact that a large number of people seek the help of others simply because they are infirm — they are frail, they are old. It is not necessarily that they lack capacity, and I think that is important to bear in mind in designing what happens with enduring powers.

The second reason for promoting enduring powers is to reduce the financial costs but, more importantly, in terms of emotional and health costs to families and those dealing with these people. My experience as Public Advocate was, on many occasions, to come across situations where families were suffering significant distress because they did not know what decisions to make on behalf of somebody. I would be very surprised if you have not had the experience of being at a funeral when somebody said, ‘He got the send-off he would have wanted’. If you stop and think about it, why do people say that? It is because it comforts you — the living — to think that we did something he or she wanted. How much more important is it therefore to try to do what people want while they are alive? Having sat around bedsides in hospitals and seeing families struggling with these decisions I am very conscious that there are savings to be made if people can be encouraged to make provisions.

The other point I make about that is the Respecting Patient Choices program at the Austin is about to publish a single-blind random study, which is the first of its kind in the world. Not surprisingly it shows how important advanced care planning has been in terms of giving effect to a person’s wishes. But interestingly there is some very strong data about the reduction in the negative impacts on families in terms of depression, anxiety and post-traumatic stress disorder. The illnesses can amount to that. Therefore the costs spill out in terms of community costs, health care costs and so forth.

But I think the most important reason for promoting enduring powers is that of promoting individual autonomy. The law assumes that as adults we are competent, and it then enables us to make decisions about those matters that intimately affect our life. While the Victorian Charter of Human Rights and Responsibilities does not use the word ‘autonomy’, many of the rights are predicated on the basis of the inherent dignity of the individual and concepts that very much flow out of the United Nations’ declaration way back in 1948.

It is clear that when a person loses capacity almost inevitably decisions are going to be made that will impact on their human rights and impact on aspects of their inherent dignity. If you look at some of the rights that are activated in the Charter in these situations, there are clearly things such as the right to move freely and to choose where you live; the right to the liberty of the person; the right not to be deprived of your property unlawfully; the right to consent to medical treatment; and privacy. In my experience privacy is one of the first rights that seems to go out of the window when people lose capacity. There are others as well.

I think the human rights aspect of enduring powers of attorney is something which reforms can pick up, and I think there are opportunities in any changes in legislation to emphasise this. For example, currently the Instruments Act makes no reference to acting in the best interests of the donor, and I think we can go further than that. I think it is important for the Act, or for any legislation, to enshrine the fact that the attorney — for want of a better term — ought to be obliged to consult with the donor as far as is possible whenever making a decision. That might seem strange because many people assume that once you lack capacity you lack capacity. I think it is very important that we see capacity as not being a black and white concept. Peoples' capacity can vary from day to day, and it can vary from decision to decision. It is important, in order to protect and promote an individual's rights, that we not make a blanket decision about capacity. In some cases that will be the situation. If somebody is in a coma then they are in a coma; they do not have fluctuating capacity.

But I think there is an emerging movement, particularly among some disability advocates, for the concept of supported decision making. It is argued that the relatively recently enacted international Convention on the Rights of Persons with Disabilities promotes the concept of supported decision making. One way in which that can be reflected in legislation dealing with enduring powers is, as I say, to require somebody to seek as far as possible to involve somebody in the decisions they make.

The question is how you achieve these wonderful goals which may, of course, be controversial — I do not know. The first and most obvious step is to simplify them. There is no doubt in my mind that people do not use enduring powers for a number of reasons, and that includes ignorance. It is psychological deterrence because people do not like confronting death and disability, but some of it is just the sheer complexity and the fact that there are all these different documents and they do not know which one they should be signing, or they sign one and they think they have signed them all.

I guess it is even more concerning if you think there is a possibility that the Mental Health Act may be reformed in a way to introduce yet another document called 'advance statement'. The government, in its response to the consultation, recently saw merit in the proposal, which might be code for, 'We are thinking very seriously about introducing yet another kind of, not necessarily an enduring power of attorney, but something of that nature.'

I think if you wanted a more dramatic example of the problems of the complexity of having more than one document, I refer to the anecdote that I gave in my submission about the metropolitan hospital in which a patient was not going to be treated, even though the clinician believed treatment was in his best interests, because the person holding the enduring power of attorney said, 'I refuse treatment' and the doctors felt they were bound by that, and it was only when a social worker blew the whistle and called in the Office of the Public Advocate that we discovered this man was holding a financial power of attorney. The extraordinary thing was that they had not even checked that. The consequence was going to be death, quite simply. You cannot think of a more dramatic example of the problems that having several documents causes.

I am not saying that they would all be overcome by having one document — somebody would still have to look at it and make sure which powers have been activated — but it might help. I think there are opportunities to have common language, common attestation provisions, about when a power takes effect and so forth. I also think that, in terms of increasing effectiveness, the use of registration of documents — and I am happy to talk more about that — is worth exploring. But perhaps it is most useful to find out what your comments are.

I will make just one other general comment, if I may. That is in relation to the refusal of medical treatment. I am very conscious of the fact that your terms of reference do not include the Medical Treatment Act. But under an enduring power of guardianship I can give somebody all of the powers that can be given to somebody under an enduring power of attorney for medical treatment, except one — that is, the power to refuse treatment. So what we have is a situation that occurs from time to time in hospitals where a decision can be made to withhold consent for treatment. But that is not the same as refusing treatment. If that subtlety is difficult to grasp, I share the difficulty, and certainly doctors find it very difficult. So we have a crazy situation where an enduring guardian can withhold consent but not refuse treatment. It seems to me that it would be a very simple matter, without affecting the Medical Treatment Act or amending it, to extend the powers that an enduring guardian had to be able to refuse treatment, thus overcoming at least one potentially difficult and complex area. The fact that we have the three different documents causes problems. I will stop there and find out what you would like to talk about.

The CHAIR — Thank you very much. I will start off by asking you about data and the use of powers of attorney. From our preliminary research up to this point we have not been able to find evidence about the level of use of powers of attorney documents. Do you have any information in relation to that? In particular you have talked about one expecting the aged and frail to be the highest users, but are there other groups as well?

Mr GARDNER — No, I am sorry, I cannot assist you there. I am not aware of any studies that have been able to measure the extent of use. I am not sure whether the aged and frail might necessarily be expected to be users, but my concern about them is that they are more likely to have need of substitute decision making. I do not know whether or not you can draw any guidance from the Tasmanians, who do have registration of their enduring powers, and whether that would give you any indication, but I am not aware of any data that is reliable.

Mr CLARK — On the issue of the role of tribunals, particularly VCAT, and perhaps to a lesser extent the role of the Public Advocate's office when enduring guardianships or enduring powers of attorney are given, what do you think their role should be in that circumstance? As you know, they have the power to set aside powers of attorney and guardianships in various circumstances. I, like other members, from time to time have constituents coming to me with issues about how they have exercised those powers. What do you think the appropriate role is for the Public Advocate's office and for VCAT where someone has appointed an attorney or guardian?

Mr GARDNER — There are two potential roles. One is in monitoring the use. There is some difference between a tribunal-appointed administrator, who is required to file annual accounts, and an individually appointed attorney, who is not. I am not sure that I favour introducing a new bureaucracy to require that role to be activated. I think the critical role, though, is in providing some safeguards where there are concerns that this document is not being used in the best interests of the individual. It is a role that VCAT currently has, and the role of the Office of the Public Advocate there is to assist VCAT by conducting some investigations. But it still relies on somebody to blow the whistle. I am not sure that I can see any better way of activating their role, but I think that is a very important role. There has got to be somewhere somebody can go. I know it is not the same as the financial power, but if you take the example I gave before about the hospital, and the fact that the social worker rang the Office of the Public Advocate and said, 'I'm unhappy, I've got a concern', that will certainly lead to a chain of action, which in fact was not a formal investigation. It was simply an intervention that led to a proper outcome.

Mr CLARK — Do I take it from that that you are saying the main role is to protect against abuse in a situation where a donor has appointed a guardian or attorney?

Mr GARDNER — I think so. As I say, there is a potential other role — that is, to simply provide a monitoring role, a support role. That involves a cost to the community, and I think there is a question about the benefit of that, given that the vast majority of people are going to have fairly straightforward affairs and are not going to be abused. It is a question of weighing up the cost benefit.

Mr BROOKS — I want to ask a question in relation to a comment that you have made in your submission and that you have mentioned again today in relation to enduring guardians being able to withhold consent for treatment but not being able to refuse treatment. In your submission you have suggested a recommendation we could make. What is the practical effect of those two different distinctions — the one being under this Act and the other one being under the Medical Treatment Act? What does that actually mean when that happens in the medical setting, in your experience?

Mr GARDNER — In a medical setting it can cause complications, simply because it is difficult for people to grasp the difference between the two. However, the number of cases in which treatment is refused are exceedingly small. It is far more common for clinicians to say, 'The treatment is futile' and to not offer it, so most people are trying to get treatment rather than refuse it. But what it does mean is that I think there has been a very low take-up rate of enduring powers of guardianship, because why give somebody powers in relation to making decisions about medical treatment when you cannot give them all of the powers that you want to give them under another document?

I think the greater problem is the fact that it simply, firstly, causes confusion; and secondly, limits the extent to which enduring powers of guardianship have been used. If I, for example, were to express the wishes to my attorney that I did not want certain treatment of a heroic nature if certain medical circumstances were met, and I was confronted by, unbeknown to me, a hospital that was rushing around on a code alert, I would want the attorney to be able to say, 'No, I refuse that treatment'. That may not be everybody's wish, but for many people it is, and I think there is a lack of clarity about it. Numerically I do not think it has caused a lot of problems, but I think it just adds to this unnecessary complexity and misunderstanding.

Mr CLARK — If I could follow up on that: there seems to be a view in the Public Advocate's office and in other parts of government that the guardianship power does not give full authority in a medical treatment context. It seems to me, and I would be interested in your views, that perhaps does not accurately reflect the powers that are given under the Guardianship and Administration Act for an enduring guardian who has got the power, as the Act says, to exercise all the powers that a parent would have in relation to a child, which is the full powers of a guardian. It seems to me that the instrument under the Guardianship Act is in fact a very broad and flexible instrument which would cover the scenario that you mention, or all others, whereas the Medical Treatment Act is a very narrow Act relating to not authorising treatment but also to refusing treatment and exercising statutory rights that would override the general legal situation. I am at a bit of a loss to understand the direction in which some advice to the community is going, because it seems to me that the guardianship appointment gives exactly the sort of breadth of coverage that you are, quite rightly, arguing for. Can you explain any more, or say what exactly is the area that you think is lacking in the power of an enduring guardian that needs to be added to by the Medical Treatment Act?

Mr GARDNER — I agree entirely that the enduring guardian has potentially, unless it is limited by the donor, a very wide range of powers. The only power missing is the power to refuse treatment. Under the Medical Treatment Act a competent adult can refuse treatment, a person appointed under an enduring power of attorney for medical treatment can refuse treatment and a guardian appointed by VCAT can refuse treatment, but a person appointed under an enduring power of guardianship cannot. That is the sole difference in the powers. What I am saying is it just seems crazy to have two documents that have got this very fine distinction drawn between them. A guardian appointed by VCAT, yes, there is no doubt about that; they can refuse treatment. But if I appointed a guardian I cannot give them that power.

Mr CLARK — But your appointed guardian can achieve exactly the same result by making a decision about medical treatment, that you are not to receive that treatment, and as long as that is the sort of decision that a parent could make in relation to their child, then that would be valid and a doctor would no longer have the authority to provide that treatment.

Mr GARDNER — Which type of guardian are you describing?

Mr CLARK — An enduring guardian appointed under the Guardianship and Administration Act — in other words, appointed by you as a donor rather than by VCAT.

Mr GARDNER — If the clinician said, 'We are proposing to provide the following treatment because in our clinical opinion this is in the person's best interests, and I, as the enduring guardian, say, 'No, I refuse treatment', I have no capacity to do that. I can withhold consent to it, but I cannot refuse it. If I withhold consent, we are left in the grey area where they say, 'We are going to go ahead because nobody has actually refused'. It is the sort of distinction that brings the law into disrepute. It is the sort of thing that is an ideal opportunity for a committee such as this to say, 'We could tidy this up, make it neater'.

Mr CLARK — I disagree with your construction of it because the enduring guardian has the authority to make arrangements.

Mr GARDNER — Yes.

Mr CLARK — Assuming that covers medical treatment matters and, as you know, there are other provisions in the Guardianship Act that set out a procedure for the medical treatment decision making.

Mr GARDNER — I understand what you are saying, but in the end it is the Medical Treatment Act which quite clearly says, 'This is the only list of people that can refuse treatment and sign a refusal-of-treatment certificate'. Nobody else can, and that list does not include somebody appointed under an enduring power of guardianship.

Mr CLARK — I accept that, but all I am saying is that I do not think that is necessary for covering the field.

The CHAIR — Right, I think the points are clear. Colin, did you want to come in on that?

Mr BROOKS — Not on that particular point, but just in a more general way. In your experience — you mentioned this in your submission and you mentioned it again today — do you find that there has been some confusion, lack of awareness, maybe a lack of education around the use and the powers that are involved by people who are in those positions? Do you think, in your experience, that is a real problem for people, say from non-English-speaking backgrounds, maybe people from backgrounds that do not have a higher level of education? Is it a significant problem?

Mr GARDNER — I can only answer that on an anecdotal basis. I have not got empirical evidence of that, but my experience indicates that people generally did not understand well what the availability of documents was, and I base that partly upon going to public meetings, maybe meetings of Probus, Rotary, or whatever, where I asked for a show of hands from those people who have got a will. I then asked for a show of hands from people who have got an enduring power. Almost everybody had a will, but a very small percentage had an enduring power. Then I asked, 'Why is it you are worried about what happens after you are dead, but you are not worried about what happens to you when you are alive?'. I can only conclude that the reason was that they had not understood what was open to them. To conclude that the people from a non-English-speaking background would have greater difficulty, I would be guessing, but it seems logical to assume that is the case.

The CHAIR — Coming back to that: in the example you gave, both in your submission and just previously, in relation to the hospital where there was a confusion about what kind of authority was being given, what is your sense of how well professionals are being provided with information and what sorts of things do you think we can do to improve that? I am assuming we are not doing it as well as we could.

Mr GARDNER — In terms of medical professionals I have a great deal of sympathy. They are expected to have a high level of expertise in relation to clinical matters, but we also have an expectation that they understand the law. My experience is there is an appalling misunderstanding within the medical profession generally about the law, even matters as basic as the requirements for informed consent. It is difficult and I do not think we have done it well. I think we have made it harder for them by making the law more complex than it needs to be. As to other professionals, that is a harder question for me to answer because I am not quite sure which professionals are most important, whether it be accountants, or whatever.

The CHAIR — You would think, from the example you gave before about wills when talking to Rotary and Probus groups, that it would be the legal profession or the same people who would be advising them about wills.

Mr GARDNER — My impression is that the legal profession has changed very much in the last 10 to 15 years. Whereas once if somebody made an appointment for a will, you would have got a will, but now I think most lawyers would say, 'Have you thought about the following'. How well they understand the medical aspects of that is another matter, but, from what I have observed, I would have thought the legal profession is doing a lot better at that.

The CHAIR — And banks?

Mr GARDNER — Banks are an interesting case. Part of the problem we have with banks is the interface — the tellers — many of whom are part time, many of whom are casual and who have, once again, a high degree of detail that they are expected to be across, and we expect them to have this as well.

It is also exceedingly difficult for banks that clearly have got a duty to their customers. Let me give you an example once again of an area manager who rang me and said that one of his bank managers had contacted him about somebody who had come into the bank and demanded to withdraw all his money in cash. There had been an argument which had finished up with the man shouting, 'It is my money, you can't tell me what to do with it' and the bank manager had said, 'That is right, but I am sorry, we do not have $1.2 million in cash. You will have to come back this afternoon'. The manager got the $1.2 million in cash. The man did not come back. The manager drove past his house that night and there he was sitting watching TV. When confronted the next day he said, ‘I did not come and ask you to withdraw my cash. Why would I do that?’. Early signs of dementia. The bank has a real problem because it does have to respect that, and it is very difficult to say, ‘Who is that person sitting over there who has come into the bank with you? Are they really the person getting this money and not you?’. On the other hand the benefit for the banks is that they are not worried about medical powers; generally they only deal with the one power.

The CHAIR — Can I follow that up in relation to the forms? You and other people who have made submissions have put the same view that there should be a single document that people sign off on, but inside that there should be different areas, and there does not seem to be any disagreement around the conceptualisation of the different kinds of powers, so you have one form that has the four others in it. How does that help?

Mr GARDNER — It helps because the individual only needs to deal with one document. It helps because anybody relying upon that document can far more easily go to it and say, ‘Is it section A, B or C that is being activated here?’. It helps because you do not have an agent, a guardian and an attorney; you have one title. The design of the form is difficult, and I do not pretend to have an answer for that. I am not aware of any good examples. The Queenslanders have one form, but I am told it is exceedingly long and complex. I know it is long and complex, but I am told that it is found in practice to be difficult. But I am not sure it is beyond the wit of people to develop a useful single form.

Mr CLARK — Could I explore that further? It seems to me the idea of having an integrated document is increasingly very attractive, and we want to explore how to best to make it work. There are two aspects on which I would welcome your views. First of all, would you structure it in such a way that people tick predefined boxes such as for financial and medical treatment and lifestyle — in other words, they appoint someone to do the whole of that package or none of it — or would you let them customise the things for which they make appointments and, if so, to what extent? Secondly, how would you handle a situation where someone wanted to appoint different people to carry out different functions — one to do financial, one to do medical treatment? Would you recommend or propose that they would then fill out two different forms, one for each person, and make sure they tick the right boxes, or would you envisage that you could have a form that was integrated and nominated in the one document who did which aspects? What are your views on that?

Mr GARDNER — The question is a very good one. It is the one which has troubled me before because in my experience people very commonly choose different people — one to do the financial matters and one to do the lifestyle matters. Without seeing what the final draft of a nice simplified form would look like, I suspect it might complicate it too much to have this page appointing attorney A and this page appointing attorney B. If, therefore, you were to have two documents which would be identical except that one would activate at section A and the other would activate at section B, it would be critical that there be a cross reference in each to the other, so to that extent at least there is a knowledge that there is somebody else out there. I think we need to allow for customisation like that. If it could be done in one document without making it too complex, that would be good, but I suspect it may not be possible.

Mr BROOKS — Your submission discusses the issue of registration of enduring powers of attorney but does not recommend it. I take it from that that the concern you have raised about the cost may be discouraging people from taking up the powers means that you feel the cost outweighs the benefits?

Mr GARDNER — The problem about cost is that somebody has to bear it. This is yet another cost which we impose upon the public purse which has a number of demands on it. One way of approaching that question is to say, ‘Are there ways in which we can minimise the costs of registration, regardless of who has to bear them?’.

There are a number of questions you need to examine in that, and the starting point seems to be to ask, ‘What is the purpose of registration?’. If its primary purpose is to give certainty to those who are being asked to rely upon it — for example, a bank or a financial institution — so that they can go somewhere and find out something about this, it might be useful to ask what information they actually need. If I am standing there waving a power of attorney at a bank manager and if the bank manager could ascertain that donor A did sign a document on such and such a date giving power to person B in relation to financial matters, that basic information may be all that is needed for that bank manager to look at the document and say, ‘It does have all of those features in it. I do not know that it is exactly the same document but it is that date'. If that was sufficient to rely upon, one could envisage a situation where maybe that could be done electronically so that you did not need to bother somebody in a registrar's office or so forth, which would reduce the cost. It might also help in overcoming the other problem, and that is of privacy.

I am troubled by the notion that a member of the public can walk into the guardianship board in Tasmania and say, 'I would like to have a look at Kerryn Riseley's enduring power of guardianship to see what provisions she has made and what she has said about her medical treatment and so forth'. I do not see why that should be a public document. But it may be that we can achieve the goals which are put forward for registration by having a very limited scope of what is revealed.

The other question about cost is: what are the other purposes of registration? Is it to give the document some validity? In other words, should somebody when registering it examine it and say, 'Yes, it has met all of the formal requirements. It has been witnessed properly and so forth', in which case there is a cost in doing that. Or do you say, 'No, we dispense with that'. If you examine what all of the benefits of registration are and then ask which ones do we want to activate and balance that against the cost, it is possible. The more I have thought about this since writing that submission I am veering round to thinking that registration might be feasible if you can overcome those privacy issues and if you can overcome some of the cost issues.

The CHAIR — We received and had a look at this document, the *Take Control* kit. That empowers people to look after these matters themselves and clearly gives them a whole range of information that is valuable and enables them to activate all of this themselves. On the other hand we have heard that there is a value in people becoming advocates and donors being able to step it through with the third party face to face, a human being who has an understanding of that. Could you comment on that? Do you think that is necessary? Do you think this document, like the *Take Control* kit, could stand on its own?

Mr GARDNER — It depends on the individual. For some it will. In my experience, and having assisted a number of people to sign documents of this nature, they benefit by having a third person who has some knowledge of it so that they can ask them the right questions and that person can say, 'All that means is this, and this is what you are doing here'. It also depends upon the complexity of your affairs. If you have some very complex financial affairs I think you need somebody more than the man in the street; you would benefit by having a lawyer or an accountant saying, 'You need to think about just what you are doing in relation to this'. But if you have somebody whose financial affairs are pretty straightforward — they have a house and they have a pension — you may not need that. Similarly, with medical matters it is preferable in my view to execute a document such as this, particularly where you are expressing your wishes, in consultation with a medical practitioner or an allied health professional. It does not have to be a doctor; a nurse could do this. People find these sorts of documents difficult.

The CHAIR — Thank you for that. Could we just come to the issue — we do not have a lot of time left — of capacity, which is a complicated one. You say in your submission that witnesses to a power of attorney document should be required to attest that the donor appeared to understand the nature and effect of the document that they are creating, but we have received other submissions that have suggested that many current witnesses do not have the ability to assess a donor's capacity. Some people say a lawyer can do this; others say it should be a medical professional who should do this. Could you throw some light on that?

Mr GARDNER — I have witnessed many of these and have assessed capacity in many situations. We all assess capacity frequently. The difficulty about asking that question is that for the vast majority of people there is no problem. If somebody in this room asked me, it is not going to be difficult for me to assess their capacity. If somebody is significantly demented or significantly impaired for some reason, it is not going to be difficult. The small, grey area is the problematic area. I think that what is needed there is to ensure that, if we do have a limited number of people who are allowed to witness these — and let us take lawyers as one group — lawyers understand if there is doubt, they should seek some assistance. Lawyers are used to this in the context of preparing wills. A sensible lawyer will keep a whole lot of diary notes about what questions they asked and what responses they got and how they made the assessment that a person was competent. If they have doubt about that, they should be saying, 'We really want this document to stand up, we are going to have to get some medical opinion.'.

The CHAIR — The only document I have seen is the Pharmaceutical Board's pro formas that it has, so that is the only basis I am going from. What might a lawyer draw on when they are asking people some questions and forming a view like that, for those people who might fit into the grey area that you talked about?

Mr GARDNER — If you take, for example, an enduring power of attorney for medical treatment, which requires the witness's signature with regard to capacity. If you were signing one, I would say to you, 'Tell me about this document. What powers are you giving? What is the nature of those powers you are giving? What do you do if you change your mind?'. I would expect you to be able to tell me precisely the extent of the powers you were giving and that you could revoke it. In other words, it would not be difficult.

The CHAIR — That is you, with your experience, but what about a new lawyer in their 20s, who is confronted with that situation? Can they pull something off the shelf that says: when you are in a situation like this, these are some of the things you might think about — exactly as you have described?

Mr GARDNER — Whether there is something they could pull off the shelf, I do not know, but there ought to be. But it still does not overcome the problem that in those really grey area questions you have to say: this is one where I do not think I should punt it; I really think that I need to get a medical opinion. It may be that in some cases you need a quite specialised medical opinion, but they would be rare.

The CHAIR — The other matter that is related to that is the point of activation. We have two threads. Some people say 'I'll give it all to you now', and then there are people who say 'It'll kick in when I lose capacity'. Both of them have their difficulties and their advantages. Could you comment on which option you think is preferable?

Mr GARDNER — I prefer that where the document comes into effect immediately, the presumption being that the donor, having capacity, can still regulate the behaviour of the attorney. For example, going back to the fact that in many cases it is not a lack of capacity but just age and frailness that brings these things, my mother is 95, she goes to work every day, but her mobility is limited. My brother does all of her banking but does it under her direction and control. She signed one of these, but she has not given up her autonomy.

Mr CLARK — I just want to follow up on that. I think the idea of allowing the powers to be exercised prior to incapacity is an excellent one, for the reasons you give. It does raise the question, then, of what to do when a conflict emerges when the donor is dissatisfied with what the donee is doing. Presumably they can revoke the power. Should there be some other form of override and do you think that broadening the scope of the circumstances under which powers can be exercised is going to make fraud control and prevention even more important than it is now?

Mr GARDNER — Leaving aside the psychological dynamics, mothers do not like overriding their sons. I do not know how you manage that, but in theory revocation should be all that is necessary. If in addition the legislation said 'and in exercising a power you must consult', then if somebody fails to consult the donor might not know that they are doing it. But if they do consult, and they say, 'No, I don't want you to do that', and they say, 'Mother, I'm going to do it anyway', if mother is still competent, that is when she should revoke. It is hard to see any other way than saying that is technically the answer.

Mr CLARK — It is going to make it even more important to have some mechanism whereby revocations can be communicated. I think that is a flaw in the existing system — that somebody could be running around with a power that has been revoked, and those in relation to whom it is exercised do not know that fact.

Mr GARDNER — Obviously, if you did have a registration system, the onus would be on the people who made the powers to not only register any subsequent power but any subsequent revocation.

Mr BROOKS — That leads to the point that has been made to us in submissions, that a lot of the abuse of powers seems to be inadvertent; it is not intended that people do not understand their powers properly. Do you have any suggestions on how that can be rectified?

Mr GARDNER — No. I mean, people make mistakes; we are all fallible. If you are talking about people making mistakes, I am not sure what one does about that.

Mr BROOKS — Do you think there can be better information supplied — education?

Mr GARDNER — About how to behave sensibly in terms of exercising a power? I am not sure that you can.

Mr BROOKS — Understanding that power?

Mr GARDNER — Theoretically, yes, a lot of education would help but, being realistic, we are not going to be able to educate everybody to exercise powers sensibly. We can try to educate them to not act unlawfully or maliciously.

The CHAIR — Time is getting away from us, but there is one other matter that I, at least, would like to raise, and that is to do with the concept that you talked about before, about acting in the donor's best interests — which is a judgement, of course.

Mr GARDNER — Yes.

The CHAIR — How do you think that attorneys can assess the wishes of a donor? We talk a lot about the best interests, and as a concept it is laudable, but each of us, of course, has a different view. I feel that we maybe need to develop ways of stepping a person through the process of thinking that comes under the rubric of best interests.

Mr GARDNER — I think that you can codify the things — indeed, the Guardianship Act already does do that in relation to the decision. The starting point ought to be somebody's wishes, and you ought to try to ascertain those as clearly as you can, (a) at the time of being given the power, but, (b) by consulting every time you make a decision, assuming that is feasible. But that is not going to provide all the answers. If you have somebody who has never really had any money in their life and has been very careful and finishes up with $10 000 in their older age and says, 'My wish is that you not spend that; I want it to go to my grandchildren', and the attorney says, 'Hang on, you need a motorised wheelchair for your quality of life', what are the best interests in those circumstances? It is really difficult. There are going to be cases like that where I think best interest is going to be very difficult, but I do think you can codify it to a certain extent, and the starting point has to be somebody's wishes.

Mr CLARK — If I could just follow on this duty to consult, which I think is a good one. Presumably a failure to consult would not result in the invalidity of whatever the attorney did. Would there be other sanctions attached to it — for example, a penalty for failure to consult, or would it simply be a directory or an encouragement-type provision? Also, from the Chair's question, if someone fails to act diligently in the best interests of the donor, what sanction or remedy should there be, if it is short of fraud?

Mr GARDNER — If it is short of fraud, you could have a right of recovery — in other words, a civil action to recover the damages. I think there is a value in actually making it quite clear that some things do amount to a criminal act. But otherwise it is simply a civil remedy in terms of being able to recover. Third parties have to have some assurance that they can rely upon that, even though behind the scenes there are acts of rectification.

Mr CLARK — So a failure to consult would not affect validity, but you are suggesting maybe there would be a civil sanction?

Mr GARDNER — Yes.

The CHAIR — Okay, time is up. Julian Gardner, thank you very much for your submission. Thank you for coming along this morning. It has been extremely stimulating and interesting. As I said earlier, you will be provided with a copy of the Hansard transcript. I hope you do not mind if we get in touch with you if we need to clarify anything.

Mr GARDNER — No. Thank you very much.

Witness withdrew.